

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CREED ELECTRICAL SUPPLY &
EQUIPMENT CORP.,

Plaintiff

CIV. ACTION No. 07-CV-2854
(WP4) (MDF)

v.

RON PADOVANI, U.S.ELECTRICAL
SERVICES, LLC and MONARCH
ELECTRIC CO.,

Defendants.

MEMORANDUM OF LAW

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PLAINTIFF'S MEMORANDUM OF LAW

Preliminary Statement

This memorandum of law is respectfully submitted on behalf of plaintiff, Creed Electrical Supply & Equipment Corp. (the "Creed"), in support of its application pursuant to F.R.C.P. 65, for a temporary restraining order and preliminary injunction enjoining the defendants from breaching or inducing the breach of the restrictive

covenants contained in the employment contract (the "Contract") between defendant Ron Padovani ("Padovani") and Creed.

As more fully set forth in the accompanying affidavit of Creed's President, Steven Emanuel submitted herewith, Padovani was employed by Creed in its sales division commencing in or about December 2002 and continuing through early March, 2007. At the time Padovani's employment ended he was governed by an employment contract (the "Contract"), which contained a restrictive covenant preventing his contacting or soliciting Creed clients or prospective clients who he had been in contact with for the two (2) year period prior to the end of his employment.

As is further set forth in the accompanying submission, Creed has recently learned that Padovani has breached the Contract by soliciting customers of Creed while employed by defendant Monarch Electric Co., believed to be a wholly owned subsidiary of defendant U.S Electrical Services, LLC.

Finally, the Contract specifically provides that injunctive relief is warranted under the circumstances which have been presented here.

ARGUMENT

Plaintiff is Entitled to Injunctive Relief

The standard for issuing injunctive relief is and consists of a showing that there is: "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them fair ground for litigation and a balance of hardship tipping decidedly toward the party requesting the preliminary relief. Jackson Dairy, Inc., v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2nd Cir.1979)

(per curiam). While courts in New York are generally reticent to issue injunctive relief interfering with one's ability to earn a living, there are situations where the courts have seen fit to grant injunctive relief enforcing restrictive covenants. The standard is generally well known and was set forth in a Maltby v. Harlow Meyer Savage, Inc., 166 Misc. 2d 481, 633 N.Y.S. 2d 926 (Sup Ct. . N. Y.Co. 1995), aff'd 223 A.D. 2d 516, 637 N.Y.S. 2d 110 (1st Dep't 1996) as follows:

Although the courts of New York have adopted a strict approach in construing non-competition agreements and restrictive covenants, the courts have repeatedly enjoined employees from breaching such agreements when they are reasonable in scope, duration and geographical area. (Gelder Medical Group v. Weber, 41 N.Y. 2d 680; Reed, Roberts, Assocs. v. Strauman, 40 N.Y. 2d 303; Matter of Schachter, 52 A.D. 2d 121, aff'd 41 N.Y. 2d 1067). While powerful public policy considerations militate against enforcement of restrictive covenants (See, Columbia Ribbon & Carbon Manuf. Co. v. A-1-A Corp., 42 N.Y. 2d 496; Purchasing Assocs. v. Weitz, 13 N.Y. 2d 267, "[a]t the same time an employer is entitled to protection from unfair or illegal conduct that causes economic injury. The rules governing the enforcement of anti-competitive covenants and the availability of equitable relief after termination of employment are designed to foster these interests of the employer without impairing the employee's ability to earn a living or the general competitive mold of society). (American Broadcasting Co. v. Wolf, 52 N.Y. 2d 394, 404)." Acknowledging the tension between the freedom of individuals to contract, and the reluctance to see one barter away his freedom, the State enforces limited restraints on employee's employment mobility where a mutuality of obligation is bargained for by the parties (Post v. Merrill, Lynch, Pierce, Fenner & Smith 48 N.Y. 2d 84, 89). "Indeed, the modern trend in case law seems to be in favor of according such covenants full effect when they are not unduly burdensome ... (Mohawk Maintenance Co. v. Kessler, 52 N.Y. 2d 276, 284 (citation omitted))."

It is respectfully submitted that the application of the above noted principles to the facts of this case warrants the issuance of a temporary restraining order and preliminary injunction to prevent Padovani from violating the Contract.

In Webcraft Technologies, Inc. v. McCaw, 674 F. Supp.1039 (S.D.N.Y.1998), this Court granted a temporary restraining order and preliminary injunction pursuant to a restrictive covenant significantly more limiting than what applies here.

In Webcraft, the plaintiff sought enforcement of a restrictive a covenant which limited the defendant from rendering any services in competition with the plaintiff or “soliciting business from or service the accounts of any customer of Webcraft during the two year period preceding said termination date” Id.

Unlike the provision at issue here, in Webcraft the non-solicitation provision applied with respect to any customer of Webcraft , regardless of whether McCaw had any contact with the customer. Accordingly, the Court in Webcraft limited the injunction to any accounts McCaw “solicited, contacted or acquired information about’ while she was employed.

In the present case the restriction does not require the Court to wield a “blue pencil” to pair down the restriction, because it is no more restrictive that what was ultimately approved by the Court in Webcraft.

As far as the harm to Creed and its likelihood of success, as set forth in the accompanying affidavits, Padovani has been privy to information which can be used readily by Creed’s competitors to unfairly compete. The nature of Creed’s business is such that information made known to Padovani would be extremely important for a competitor. Padovani had been acting as a sales representative and sales manager for Creed. In that capacity he was privy to Creed’s proprietary business information, which would give him an extreme advantage in soliciting Creed’s customers. For example, he knows the exact details of such matters as (i) Creed’s gross billings to each customer, (ii)

what items Creed has recently sold to each customer at what price, (iii) what the profitability of each customer is, (iv) what construction projects that customer was or will be bidding on, (v) how much the customer was or is prepared to spend for each item on the bid list for the project, (vi) how much each of Creed's suppliers charges us for each item, and other highly proprietary and valuable information. This is exactly the type of information which the Court in Webcraft determined warranted protection.

The provisions of the Contract are very narrow in terms of the restraint placed upon Padovani. Under the Contract he is free to work in competition with Creed, with the only limitation being that he can not contact or solicit Creed customers or prospective customers that he was in contact with during the two years prior to his leaving Creed. Creed has learned that Padovani has approached Creed's customers, including Filingeri Electric and Allbright Electric and has heard through various sources that Padovani is calling on or attempting to call on other such customers, including, RLJ Electric and Spirelli Electric. It is believed that there are still others with whom he is in contact at to whom Creed has not yet heard such reports.

Conclusion

Weighing the equities, the balance clearly favors Creed. The restrictions sought to be imposed are minimally intrusive and will not prevent Padovani from earning a living. They will, however, prevent him from capitalizing on the propriety information he has about Creed's customers. Under the circumstances, the failure to grant this relief will surely cause Creed irreparable harm.

For all of the foregoing reasons, it is respectfully submitted that the motion of plaintiff for a temporary restraining order and preliminary injunctive relief be granted in all respects and that Padovani be enjoined from competing with Creed in violation of the provisions of his Contract.

Respectfully submitted,

The Law Offices of Gerry E. Feinberg, P.C.

By: 

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AFFIDAVIT OF SERVICE

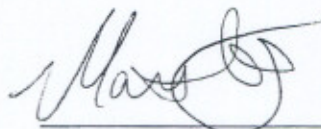
RON PADOVANI, U.S.ELECTRICAL
SERVICES, LLC and MONARCH
ELECTRIC CO.,

Defendants.

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

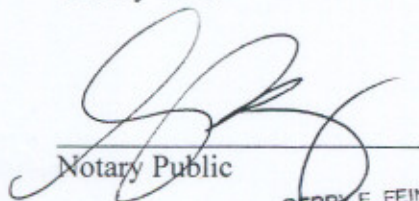
I, the undersigned, being sworn, say: I am not a party to the action, am over 18 years of age and reside at Westchester County, New York.

On May 17, 2007, I served by mail our memorandum of law upon the attorneys for the Defendants, Genova, Burns & Vernoia, Eisenhower Plaza II, 354 Eisenhower Parkway, Livingston, NJ 07039-1023



Matt Feinberg

Sworn before me this 17 day
of May 2007



Notary Public

GERRY E. FEINBERG
NOTARY PUBLIC State of New York
No. 21-48800
Qualifies Westchester County
Commission Expires 12/13/11

